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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNY RAY JOHNSON,

Defendant and Appellant.

C072734

(Super. Ct. No. 11F06369)

A jury convicted defendant Kenny Ray Johnson of attempted premeditated murder (Pen. Code, §§ 664/187, subd. (a))¹ with enhancements for committing the crime in association with a criminal street gang (§ 186.22, subd. (b)(1)) and discharging a firearm causing great bodily injury (§ 12022.53, subd. (d)). The trial court sentenced defendant to 40 years to life in state prison.

On appeal, defendant contends there is insufficient evidence to support the gang enhancement. We shall affirm.

¹ Undesignated statutory references are to the Penal Code.

FACTUAL BACKGROUND

In September 2010, defendant and A’Ron Powe fought in juvenile hall along with four other residents. The fight started during breakfast when two residents stood and yelled “This is FAB.”² “You all a bunch of soft-ass niggas.” Juvenile hall personnel knew Powe belonged to FAB, while defendant was a member of the rival gang AOB³ who had proclaimed his membership in juvenile hall. Officers used pepper spray to break up the fight. Powe spat on defendant as they were being escorted to their rooms.

About a year later, Exnonnee Small hosted a birthday party for a family friend on September 3, 2011. Powe, Dejaun Walls, Leonard Boykin, and several other people went to the party together. At some point, Powe, Walls, and Boykin walked back to a friend’s car to get some CD’s for the party. While he was in the car getting the CD’s, Walls heard Powe arguing with another person.

Tashamia Barrow drove her Dodge Magnum and dropped defendant and several friends off at the party. When Powe spotted defendant, the two started yelling at each other. Defendant’s companions gathered around and everyone started yelling. As the confrontation continued, defendant and his friends yelled, “Fuck Oak Park,” and Powe shouted back “Fuck KABB”⁴ or “Fuck AOB.” Defendant replied, “Fuck Oak Park. It’s KABB out here.”

Barrow got several calls asking her to pick up the people she dropped off at the party. Defendant’s group piled into the Magnum as it pulled up. Defendant fired four gunshots with a silver .38-caliber handgun before the car pulled away. As defendant

² FAB is an Oak Park gang affiliated with the Bloods.

³ AOB is a gang not actively involved with the Bloods, but is a Bloods set, and associated with G-Mob, a gang that claims a specific neighborhood within South Sacramento (but not affiliated with the Bloods or the Crips).

⁴ KABB is a subset of a group affiliated with G-Mob.

fired, his group yelled out, “Fuck you. It’s KABB.” Walls was shot in the back as he and Powe’s group ran from the gunfire. He was later taken by ambulance to the hospital for surgery.

Testifying, Powe admitted being a member of FAB, which he described as a “mentality” of a predominately Oak Park group. A comment like “Fuck FAB” would be offensive and disrespectful. A member of the group who would not fight to defend it risked being considered “a punk” by the group. If defendant was acquitted, Powe said “it [would] be handled in the streets” and “anything could happen.”

Sacramento Police Detective Justin Saario testified as an expert on African-American street gangs, and the AOB in particular. AOB, a local gang associated with the G-Mob, Guttah Boyz, KABB and Starz gangs, is a rival of FAB, a gang affiliated with the Bloods. In South Sacramento the two rival umbrella gangs are G-Mob and Oak Park, with their respective subset gangs, AOB and FAB, facing off against each other.

Detective Saario opined that AOB is a validated street gang by having 30 to 40 members, a common name and hand sign, and having engaged in a pattern of criminal activity, primarily robberies and burglaries. The gang existed as far back as 2008, when a school resource officer noticed individuals claiming the gang name AOB.

Detective Saario testified that Volner Mack, a validated AOB member, was convicted of possession of a concealed firearm in 2010 after he was found with other people in a vehicle who tried to flee a police stop. A few days after the incident in this case, Mack was arrested in another shooting.

In 2010, Laderrian Buckner, another validated member of AOB, was convicted of a home burglary which he committed with Jacory Carter. Carter is the brother of Del Carter, who was with defendant on the night of the shooting.

In February 2009, defendant was associating with Thomas Salaam, an AOB member. Later that month, defendant was with a group who committed a robbery. In January 2010, defendant and two associates confronted another group, demanded their bicycles and robbed their victims. Defendant and a group confronted another group in June 2010, where they accused one member of snitching, punched the person, and took iPods from two of them.

FAB is a validated gang with up to 50 members. Its umbrella gang, the Oak Park Bloods, claims over 300 members.

Detective Saario testified that defendant is a validated AOB member based on: his 2009 association with validated AOB members, committing crimes with validated AOB members in 2010, his intended victim, Powe, was a validated FAB member, his juvenile hall fight with Powe, his statements during the shooting, and social media postings identifying defendant as “AOB Ken.”

According to Detective Saario, respect is very important to a gang member and can be obtained by committing acts of violence. Yelling your gang name out is another way of getting respect for your gang. Presented with a hypothetical based on the facts of the case, Detective Saario found the crime benefitted AOB because shooting at a rival gang member enhanced the gang’s general reputation as well as its reputation to be feared.

DISCUSSION

Defendant contends there is insufficient evidence that AOB was a criminal street gang and that defendant committed the crime to benefit AOB to support the gang enhancement. We disagree.

In considering a claim of insufficiency of the evidence, we review the record in the light most favorable to the judgment to determine whether it discloses reasonable and

credible evidence of solid value such that a reasonable trier of fact could find defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [61 L.Ed.2d 560, 573-574]; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Section 186.22, subdivision (b)(1) provides an enhancement for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members”

Subdivision (f) of section 186.22 states, “As used in this chapter, ‘criminal street gang’ means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”

“Pattern of criminal gang activity” “means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more” specified offenses after the effective date of the statute “and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons.” (§ 186.22, subd. (e).) The listed offenses include burglary, robbery, and possession of a concealed firearm. (§ 186.22, subd. (e)(2), (11), (23).) The “two or more” predicate offenses do not need to be proven to be gang related in order to serve as predicate offenses for section 186.22. (*People v. Gardeley* (1996) 14 Cal.4th 605, 621.)

Defendant contends the People did not prove that AOB was a criminal street gang because the testimony was insufficient concerning one of the predicate offenses, the possession of a concealed firearm offense by Volner Mack. He claims Detective Saario’s

testimony is insufficient on this point because, while he identified Mack as a validated AOB member, Saario did not state any basis for that opinion other than the statement itself. Defendant recognizes that expert testimony may embrace the ultimate issue to be decided by the trier of fact. (Evid. Code, § 805; *People v. Doss* (1992) 4 Cal.App.4th 1585, 1596.) Nonetheless, he concludes the testimony was improper because it was tantamount to “the expert stating that [defendant] is guilty of the gang enhancement.” (See *People v. Torres* (1995) 33 Cal.App.4th 37, 46-47 [an expert may not testify as to the guilt or innocence of the defendant].)

Detective Saario’s testimony that Mack was a member of the AOB was sufficient to establish his membership in the gang and thus establish a predicate offense for the gang enhancement. An attack on the alleged lack of supporting evidence for an expert opinion is actually an attack on the basis for that expert opinion. Since defendant did not object to the alleged lack of foundation at trial, his contention is forfeited. Saario did not tell the jury that defendant committed the gang enhancement. (*People v. Chatman* (2006) 38 Cal.4th 344, 397 [the defendant could not argue on appeal that a question called for improper opinion evidence when he did not object on that basis at trial].)

Defendant’s other claim, that there is insufficient evidence of a specific intent to aid the gang, is based on the fight between defendant and Powe in juvenile hall and Powe’s testimony that he intended to fight defendant in the middle of the street on the night of the shooting. According to defendant, this evidence establishes the shooting was the product of a personal confrontation between defendant and Powe rather than defendant’s intent to benefit his gang.

Gang expert testimony established that the shooting benefitted defendant’s gang by enhancing its reputation in general and its reputation as a gang to be feared. The shooting came after a verbal confrontation between defendant and his fellow gang members and Powe and members of his rival gang. During the confrontation, both sides

exchanged epithets against the rival gang, and an insult at Powe's gang was yelled out as defendant fired. While defendant and Powe previously fought in juvenile hall, this confrontation was also gang related. Although there was some evidence of personal animosity between defendant and Powe, the jury could reasonably agree with the greater weight of evidence showing gang motivation and find that defendant fired his gun with the specific intent to benefit his gang. Substantial evidence supports the true finding on the gang enhancement.

DISPOSITION

The judgment is affirmed.

____ BUTZ _____, J.

We concur:

____ RAYE _____, P. J.

____ HOCH _____, J.